

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

REGINALD SURRETT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99 C 7750
)	
WILLIAM E. BOYD,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Reginald Surratt has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, alleging that he was deprived of his rights to the effective assistance of counsel and due process in connection with his guilty plea to first degree murder. For the reasons that follow, the Court denies Surratt's petition.

Facts

Surratt was charged with murdering Regina Gentry, his girlfriend, by beating her to death with the handle from a snow shovel. He was represented by attorney George Howard. In June 1995, Surratt entered a plea of guilty to murder and was sentenced to 30 years in prison.

In his habeas corpus petition, Surratt alleges that he told Howard that Gentry had attacked him in a fight that took place after Surratt tried to take back money she had stolen from him; Surratt believed that could claim self-defense. He says that Howard advised him that he had no chance of winning at trial and that if he went to trial on the murder charge and was convicted, he would be

sentenced to life in prison. He claims that Howard had a conference with the prosecutor and the trial judge and after the conference told Surratt that in exchange for a guilty plea, the prosecutor and judge were willing to reduce the charge to manslaughter and that he would be sentenced to between 10 and 15 years. Surratt says he feared getting a life sentence and decided to plead guilty.

Surratt alleges that when he appeared in court for the plea hearing, the trial judge relied on erroneous information that Surratt had previously been convicted of assaulting Gentry and had been sentenced to probation for that offense. As a result of this erroneous information, Surratt alleges, he was sentenced to 30 years for murder instead of the agreed sentence of 10 to 15 years for manslaughter. He claims that after the hearing, Howard promised to move to withdraw the guilty plea based on the erroneous information that had been given to the judge, but that Howard never followed through on this promise.¹

Surratt raises two claims in his habeas corpus petition. First, he asserts that he was denied the effective assistance of counsel in that Howard failed to conduct an adequate investigation, strong-armed Surratt to plead guilty, and failed to correct the erroneous information presented to the judge concerning Surratt's supposed criminal history. Second, Surratt alleges that the trial court's reliance on erroneous information in sentencing him was a violation of his due process rights.

Respondent has provided the Court with the transcript of the proceeding at which Surratt pled guilty and was sentenced. It directly contradicts the primary contentions made in Surratt's habeas corpus petition. At the plea hearing, the trial judge advised Surratt that he had been charged with first

¹ Surratt notes that Howard was later disbarred but he does not contend that the fact that Howard faced disciplinary action had any effect on his representation of Surratt.

degree murder and that the sentence could range from 20 to 60 years in prison. Surratt stated that he understood this. Tr. A3. He stated that he had not been forced or threatened to plead guilty, and when asked by the judge, “[h]as anyone promised you anything to have you plead guilty,” Surratt said no.

Tr. A5. After the prosecutor described the factual basis for the plea, the judge asked:

THE COURT: Sir, knowing the nature of the charge, the possible penalties and your rights under the law, **what is your plea to Count I, the charge of murder, intent to kill**, guilty or not guilty?

THE DEFENDANT: Guilty.

Tr. A7 (emphasis added).

Attorney Howard briefly described mitigating factors for the court and said that Surratt was asking the judge “to acquiesce in the pretrial conference” – an obvious reference to a guilty plea conference that had been conducted with the court pursuant to Illinois Supreme Court Rule 402. *Id.*

The following colloquy ensued:

THE COURT: This is an agreed plea. Both sides waive presentence investigation?

MR. HOWARD: Yes.

THE COURT: **State what is your recommendation?**

MR. WEISS: **State would be recommending 30 years House of Corrections.**

THE COURT: **Is that the agreed sentence, Mr. Howard?**

MR. HOWARD: **Yes.**

...

THE COURT: For purposes of presentence investigation, I find the defendant’s criminal history, January 19, 1987, retail theft, supervision; June 15, ‘87, retail theft; June 16, theft, two days House of Corrections; July 8,

1993, domestic battery, one year probation. The individual who was the subject of that domestic battery was the deceased in this case.

Anything you want to say before sentencing?

THE DEFENDANT: No. Just that I'm truly sorry.

THE COURT: On the plea of guilty which I found voluntary and supported by factual basis, judgment having been entered, count 1, I sentence you to a term of thirty (30) years Illinois Illinois [sic] Department of Correction. Upon release you will have to serve a term of three years mandatory supervised release. You're to receive credit for time spent in pretrial detention in accordance with Illinois law.

Is that the agreed sentence, state, defense?

MR. HOWARD: **Yes, sir.**

THE COURT: **Mr. Surratt?**

THE DEFENDANT: **Yes.**

Tr. A8 - A9 (emphasis added).

In short, the transcript of the plea and sentencing establishes that Surratt was fully aware that he was pleading guilty to murder, understood that the possible penalty was from 20 to 60 years, and acknowledged his agreement to a sentence of 30 years. His claim that he believed going into the hearing that he would get a sentence of between 10 and 15 years and that he thought he would be pleading guilty to manslaughter is directly contradicted by the record.

Surratt's current claim regarding the guilty plea is also somewhat at odds with the claim he made in the post-conviction petition that he filed in state court. There Surratt alleged that Howard urged him to agree to a 30 year sentence because if he was convicted after a trial he would get at least 45 years. *See* Post-conviction petition, p. 5. He says that Howard told him that if he agreed to plead

guilty and accept a 30 year sentence, Howard would thereafter file a motion to reduce the charge to manslaughter and reduce the sentence accordingly. *Id.*

In his post-conviction petition, Surratt also contended, consistently with his allegations here, that Howard failed to investigate the claim that Surratt had previously been convicted for assaulting Gentry and that if Howard had done so, he would have learned that this was false. Surratt alleged that the sentencing judge erroneously took the purported conviction into account in imposing sentence. *Id.*, p. 7.

The trial court denied Surratt's post-conviction petition, ruling that his claim about what Howard had promised him prior to the guilty plea was contradicted by Surratt's statements at the plea hearing. The court also ruled that the alleged error regarding Surratt's prior record was insufficient to call for relief, because Surratt had not shown "how that would substantially change the sentence he would receive on an agreed-to plea." Tr. B5.

On appeal, after Surratt's appointed public defender moved to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), Surratt filed a *pro se* brief in which he represented the facts just as he had in his post-conviction petition. The appellate court affirmed the dismissal of the petition. Surratt's petition for leave to appeal to the Illinois Supreme Court was denied.

Discussion

Respondent argues that Surratt's claims have largely been procedurally defaulted. A habeas corpus petitioner is deemed to have procedurally defaulted his claim if (among other things) he did not fairly present the claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 277 (1971). To be considered to have fairly presented his claim to the state courts, the petitioner must have submitted both

the operative facts and controlling legal principles to the state court. *Id.*; see also, e.g., *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1998). That said, we must take care to “avoid hypertechnicality” in determining whether a claim was fairly presented. *Williams v. Washington*, 59 F.3d 673, 677 (7th Cir. 1995); *Verdin v. O’Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992). The petitioner “may reformulate somewhat the claims made in state court” so long as the substance of the federal claim was fairly presented. *Verdin*, 972 F.3d at 1474.

The Court rejects respondent’s claim of procedural default. There is no question that the factual rendition Surratt makes to support his present claim of ineffective assistance concerning the entry of his guilty plea is somewhat at odds with what he said in his post-conviction petition. Here Surratt says he thought he was going to plead guilty to manslaughter and get a sentence of between 10 and 15 years, and when this did not happen, Howard promised to seek a reduction; there Surratt said he agreed to plead guilty to murder and get a 30 year sentence based on Howard’s commitment to make a post-plea motion to reduce the charge to manslaughter and the sentence to 10 to 15 years. But these claims, though they rely on a different sequence of events, are at their foundation the same; Surratt has consistently claimed that he thought he would end up with a 10 to 15 year sentence and was thereby misled into pleading guilty. Though his current rendition of the facts is different from the one he gave in his post-conviction petition, the differences may be attributable to the fact that Surratt was unable to consult the transcript of the proceedings to reconstruct what had happened in court: in his post-conviction petition, Surratt pointed out that he had requested the transcript of his guilty plea and sentencing but that this request had been refused. See Post-conviction petition, p. 7. The plea hearing in its entirety likely took no more than 10 minutes; it is reasonable to assume that this was a time of

considerable stress to Surratt, making it not unreasonable to believe that he would have difficulty recalling the sequence of events exactly as it occurred. Under the circumstances, the Court believes that Surratt's ineffective assistance claim relating to his entry of the guilty plea was fairly presented to the state courts.

The Court likewise cannot conclude that Surratt's claim that Howard failed to investigate his prior record and allowed the judge to rely on erroneous information has been procedurally defaulted. Surratt made exactly this point in his post-conviction petition and included it in his *pro se* appeal brief and petition for leave to appeal to the Illinois Supreme Court. For the same reason, the Court disagrees with respondent's procedural default argument concerning Surratt's due process claim. Surratt made it clear to the trial court that he was claiming that the sentencing judge relied on erroneous information. *See* Post-conviction petition, p. 7. Illinois law prohibits a post-conviction petitioner from including "[a]rgument and citations and discussion of authorities" in the petition. 725 ILCS 5/122-2. Though the same statute requires the petitioner to "clearly set forth the respects in which petitioner's constitutional rights were violated," Surratt complied with that requirement, and the trial judge just as clearly understood Surratt to be claiming that erroneous information had been used in sentencing him. *See* Tr. B5. In his *pro se* appeal brief and his petition for leave to appeal, Surratt again made it clear that he was arguing that his rights were violated by the sentencing judge's reliance on erroneous information. The claim was fairly presented.

On the merits, however, all of Surratt's claims fail. We begin with his claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984), requires Surratt to show that Howard's representation "fell below an objective standard of reasonableness" and that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court held that this same test applies to collateral proceedings in which the defendant seeks to undo the effect of a guilty plea via a claim of ineffective assistance of counsel. The success of a claim that counsel did not fully investigate "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Id.* at 59.

Surratt's claim that he believed he would end up with a 10 to 15 year sentence is unsupported by anything other than Surratt's uncorroborated protestation. This is insufficient. "[T]he representations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Though "the barrier [imposed by] the plea or sentencing proceeding record ... is not invariably insurmountable," *id.* at 74, a court is not required to accept representations that fly in the face of the record and are unsupported by any details or corroboration. Here Surratt has provided none. Just as importantly, he has now told three different stories about he what was told prior to the plea: the one he told to the sentencing judge at the time of the plea; the one he told in his post-conviction petition; and the one he tells here. His current claim, when viewed in the light of the record of the plea hearing (which one would expect to have occurred moments after his Surratt's pre-hearing discussion with Howard), is "palpably incredible" and is therefore subject to being

summarily rejected by the Court. *See Blackledge*, 431 U.S. at 76. *See also, e.g., Bridgeman v. United States*, 229 F.3d 589, 592 (7th Cir. 2000); *United States v. Mitchell*, 58 F.3d 1221, 1226 (7th Cir. 1995); *United States v. Byrd*, 669 F. Supp. 861, 866 (N.D. Ill. 1987). Surratt has not overcome the presumption that his statements to the judge – that he understood that he was pleading guilty to murder, that no promises had been made, and that he had agreed to a 30 year sentence – were true. The Court therefore rejects his claim of ineffective assistance with regard to the entry of his guilty plea.²

Surratt's claims that Howard was ineffective for failing to discover and tell the judge that he did not have a prior conviction for an assault against Gentry, and that his rights were violated because the trial judge relied on this supposedly erroneous information, likewise fail. First of all, the only evidence before the Court at this time indicates that Surratt indeed pled guilty to domestic battery in 1993 and received a sentence of probation. As respondent notes in its answer to Surratt's habeas corpus petition, a copy of a certified statement of conviction which was attached to Surratt's state post-conviction petition reflects that he pled guilty to a charge under former Ill. Rev. Stat. ch. 38, §12-3.2(a)(1) – domestic battery – and was sentenced to a term of probation. *See Respondent's Answer*, p. 15. Second, Surratt fails to allege any facts that would suggest that Howard's knowledge that he did not have this prior conviction would have changed his advice to Surratt about pleading guilty as opposed to going to trial. Certainly there is no indication that it would have changed *Surratt's*

² Surratt has provided no support for the proposition that a post-plea motion to reduce the sentence to 10 to 15 years, below the mandatory minimum for the murder charge to which Surratt had pled guilty, would have had any chance of success.

decision; Surratt was obviously well aware of his own prior record when he agreed to a 30 year sentence.

Surratt's real claim can only be that if Howard had advised the prosecutor and judge of the error, they might have been willing to agree to a sentence of less than 30 years. But Surratt offers nothing to support such a claim and likewise did not do so in the state court. Under the circumstances, the state judge's ruling that Surratt had failed to show that the allegedly erroneous information had any effect on the sentence and thus had not shown a violation of his constitutional rights was a reasonable application of federal constitutional law. For this reason, under 28 U.S.C. §2254(d)(1), Surratt is not entitled to habeas corpus relief.

Conclusion

For the foregoing reasons, the Court denies the petition for a writ of habeas corpus. Judgment will enter in favor of respondent. On its own motion, the Court grants petitioner leave to proceed *in forma pauperis* on appeal, because he appears to be unable to pay the appellate filing fee and can satisfy the criteria set forth in Fed. R. App. P. 24(a). However, the Court denies a certificate of appealability under 28 U.S.C. §2253(c)(2), as petitioner has made no substantial showing of the denial of a constitutional right.

MATTHEW F. KENNELLY
United States District Judge

Date: February 5, 2001